

CAN-SPAM Rulemaking, Project No R411008

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RDS

RDS is an Indiana-based, privately owned core data processor for financial institutions. Formed in 1981, the company is currently providing software solutions to more than 100 financial institutions across the country. ASP (service bureau) and in-house processing options are available, depending on the needs and resources of the client. In addition to its core software product, RDS offers add-on modules such as Collections, ATM and Debit Card Processing, Mortgage Servicing and Origination, Disaster Recovery, and more.

RDS offers an electronic content management solution, Document Manager Online Statements, which allows financial institution customers to access their monthly account statements and cancelled checks online. RDS sends electronic mail (e-mail) messages to financial institution customers to notify them when their statements are ready. This same product will also make customer information returns (IRS Forms 1099, 5498, etc.) available electronically in 2005.

Document Manager Subscription Procedures

Financial institution customers who wish to access their deposit, loan, home equity line of credit, or credit card account statements online subscribe using either RDS' standalone Web site or the client financial institution's Internet banking Web site. The customer must provide their e-mail address when subscribing so they may receive e-mail notification as required by Regulations E (12CFR205.17(c)(2)) and Z (12CFR226.36(d)(2)) that their statement is available.

If the customer subscribes using the financial institution's Internet banking Web site, the e-mail address is passed to RDS by the institution's Internet banking provider. Using either method, subscription is instantaneous for both online statements and e-mail notification. RDS maintains the list of customer e-mail addresses after subscription.

Unsubscribe procedures are institution-specific. Some institutions may not allow customers to unsubscribe using the Internet, but require the customer to call or write the financial institution. All financial institution customers are permitted to maintain their e-mail addresses using the Internet; some customers are permitted to unsubscribe from online statements using the Internet. All Internet updates made by the customer, including unsubscribe, are immediate.

RDS recently added functionality to upload batches of e-mail addresses in order to synchronize multiple address lists, but this functionality is not yet available to client financial institutions.

The e-mail address upload function cannot be used to add e-mail addresses. When made available to financial institutions, each institution that chooses to use the batch function will be responsible for maintaining the list of e-mail addresses. The batch function updates e-mail addresses only and does not affect the customer's subscription to online statements or e-mail notification.

The only electronic mail messages RDS sends to financial institution customers are statement notifications, but client financial institutions may include marketing information in those notifications if they choose.

Criteria for Determining Whether “The Primary Purpose” of an Electronic Mail Message is Commercial

In general, RDS believes that the net impression standard is sufficient to determine whether the primary purpose of an electronic mail message is commercial. RDS believes it is more useful to set clear, affirmative standards for transactional or relationship messages to ensure that these valid exceptions are not abused.

The identity of an e-mail's sender does not necessarily determine the e-mail message's primary purpose. The primary purpose should be determined by the nature of the product or service being promoted. If, to use an example from the request for comment, a professional sports league sends e-mail promoting its involvement with a charitable organization, what is it promoting? Is the e-mail attempting to raise funds by promoting a specific charitable event, or promoting a charitable event being held in concert with a professional sporting event (for example, collecting donated coats at a football game)? Or does the email promote a sporting event and simply note in passing, perhaps with a logo at the bottom of the email, that the league is a sponsor of a specific charity?

The nature of electronic mail, however, does make necessary one additional criterion for determining the primary purpose of an electronic mail message. If advertising is included in physical mail, the additional cost of paper and postage for the advertising is borne by the advertiser; the consumer need only throw it away. Using electronic mail, however, the cost of downloading and storing advertising material, especially large graphic files, is borne by the consumer, and is particularly burdensome to consumers with low-bandwidth Internet connections and limited mailbox size. Thus, advertisements included in an electronic mail message should not substantially increase the overall size of the message if the message's primary purpose is not commercial. It would be difficult, however, to develop a concrete standard for “substantially increase.”

Modifying What Is a “Transactional or Relationship Message”

To determine whether the primary purpose of an electronic mail message is one of the purposes identified in 17(A)(i)-(v), the electronic mail message should be required to meet the following criteria:

1. The presentation of the transactional or relationship information identified in 17(A)(i)-(v) should meet the clear and conspicuous standard as set out in the Federal Reserve Board's Regulation P at 12CFR216.3(b)(1) and (2)(ii):

(1) *Clear and conspicuous* means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice.

(2)(ii) *Designed to call attention*. You design your notice to call attention to the nature and significance of the information in it if you:

- (A) Use a plain-language heading to call attention to the notice;
- (B) Use a typeface and type size that are easy to read;
- (C) Provide wide margins and ample line spacing;
- (D) Use boldface or italics for key words; and
- (E) In a form that combines your notice with other information, use distinctive type size, style, and graphic devices, such as shading or sidebars, when you combine your notice with other information.

The Commission may also wish to consider using a modified version of the “more conspicuous” standard in Regulation Z 12CFR226.17(a)(2), requiring that transactional or relationship information in the electronic mail message be more conspicuous than any advertising information included in the message.

2. The message should not increase the number of electronic mail messages the consumer receives. Changes in terms, features, status, or standing must be material; statements provided as in the normal course of business. Companies should not be permitted to use trivial changes to consumer accounts or “daily periodic statements” as an excuse to send additional commercial messages.
3. As discussed under the previous “Criteria for Determining Whether ‘The Primary Purpose’ of an Electronic Mail Message is Commercial” section, advertisements included in the electronic mail message should not substantially increase the overall size of the message. Large file sizes increase transmission and storage costs to the consumer. If a consumer has agreed to receive electronically notices required by Federal statute or regulation, and the sender includes HTML or other graphic advertising material in the notice that increases the file size of the message, the sender should be required to provide the consumer the option of receiving all future required notices free of advertising material.

Modifying the 10-Business-Day Time Period for Processing Opt-Out Requests

Given that Section 5 (a)(3) of the CAN-SPAM Act requires the initiator of a commercial e-mail to provide an Internet-based mechanism to opt-out, ten business days is a very long time to process an opt-out request for electronic mail. Most subscription systems for electronic mail lists are nearly instantaneous; systems to unsubscribe should be equally so. If a consumer makes an opt-out request directly to the entity responsible for maintaining the list of e-mail addresses from which they wish to unsubscribe, the maximum time to process the request should be one business day, which allows for overnight batch processing.

If multiple entities are involved in initiating the commercial mail message from which the consumer wishes to unsubscribe, then some additional time may be required. If, for example, a

business contracts with a third-party commercial e-mail vendor to send advertising material, and the third party controls the e-mail list, then 3-5 business days should be allowed to process an opt-out request made to the business rather than to the third-party mailer.

Additional time should be allowed if the consumer does not follow the directions for opting out that the sender is required by Section 5(a)(3) of the Act to include in the message. Additional time for not following directions is similar to the allowance in Federal Reserve Regulation Z for additional time to process credit card payments that do not conform to the requirements described on the consumer's statement (12CFR226.10(b)).

In all cases, the senders should be required to maintain a list of consumers who have opted-out of receiving commercial e-mail. Senders should use that list to prevent reacquisition of a consumer's e-mail address through purchasing of lists of e-mail addresses or by changing third-party commercial e-mail vendors.

Issuing Regulations Implementing the Act

Definition of "sender"

The Commission should clarify the definition of "sender." In doing so, the Commission should consider the telemarketing regulations at 16CFR310 as a model for differentiating the role of a company offering a commercial product for sale from a third party that company may engage to send commercial electronic mail messages. While the definition of "sender" in the Act logically corresponds to the definition of "seller" at 310.2(z), there is no logical counterpart in the Act to the definition of "telemarketer" at 310.2(bb).

Thus, RDS advocates the Commission add a term such as "originator" to describe the entity who transmits an advertising campaign consisting of commercial electronic mail messages. The sender and originator may be the same or separate entities.

In addition, RDS advocates the Commission add a term such as "commercial originator" to describe an entity "which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of" [15USC1681a(f)] transmitting advertising campaigns consisting of commercial electronic mail messages.

For convenience, "originator" and "commercial originator" will be used in this sense in the following paragraphs.

If a sender (or senders) procures a commercial originator to initiate commercial electronic mail messages, the commercial originator must provide a means, as required for senders by Section 5(a)(3) of the Act, for the consumer to opt out of receiving future commercial e-mail from the commercial originator, regardless of what sender procures the originator's services. This means should be in addition to the opt-out method provided for the sender(s).

A consumer's affirmative consent to receive commercial e-mail from a sender who procures a commercial originator's services overrides the consumer's opt-out for the commercial originator, but only for the specific sender to whom the affirmative consent was given.

Forward to a friend

Whether the sender of a commercial e-mail message can be held responsible for forward to a friend campaigns is dependant upon the nature of the forward. If the original recipient of the message simply clicks the Forward button in their e-mail application, there is no way for the sender to determine or monitor to whom the recipient is forwarding the message. If, however, the recipient of the original message forwards the message using the sender's Web site, and the sender provides an inducement or incentive of any value to the recipient in exchange for such forward, then the sender should be required to verify that the recipient(s) to whom the message is being forwarded has not previously made a request not to receive commercial e-mail messages from the sender. If no incentive is provided to the original recipient to forward the message, then the sender should have no responsibility to determine whether the forwarding recipients have previously requested not to receive commercial e-mail from the sender. The original recipient forwarding the message should not be liable under the Act, provided the original recipient is genuinely a consumer forwarding the message to other consumers they actually know.

A sender should not be required to prevent information from being forwarded from a Web site if the sender did not solicit or otherwise induce the forward. For example, if a person had opted out of receiving commercial messages from the *The Washington Post*, an acquaintance of that person should not be prevented from forwarding a news article published in *The Washington Post* to that person, nor should *The Washington Post* be required to verify that the person to whom the message is being forwarded has not previously opted out of receiving commercial e-mail messages from *The Washington Post*. While *The Washington Post* should not be prohibited from including advertising material in the message, the message should meet the primary purpose criteria discussed previously in that any of the advertising material should not significantly increase the byte size of the message beyond what is necessary to transmit the information that is the e-mail message's primary purpose. In any case where the sender provides the mechanism for the forward, the sender should be required to include in the forward the verified e-mail address of the person who forwarded the message.

Valid Physical Postal Address

The valid physical postal address of the sender required by Section 5(a)(5)(A)(iii) should not be permitted to be a post office box or mail drop. Rather, the address should meet requirements similar to customer identification program regulations issued by the Department of the Treasury at 31CFR103.121(b)(2)(i)(A)(3):

Address, which shall be:

- (i) For an individual, a residential or business street address;
- (ii) For an individual who does not have a residential or business street address, an Army Post Office (APO) or Fleet Post Office (FPO) box number, or the residential or business street address of next of kin or of another contact individual; or
- (iii) For a person other than an individual (such as a corporation, partnership, or trust), a principal place of business, local office, or other physical location;

Such requirement ensures that consumers, regulatory agencies, and law enforcement will have access to the persons responsible for sending the e-mail.